Supreme Court, U.S.
FILED

931444 MAR 14 1994

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993.

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COMMONWEALTH OF MASSACHUSETTS, ET AL.,
*Petitioners*,

*v.*

DANIEL J. GATELY, ET AL.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## Question Presented

Whether the heightened standard for irreparable harm in employment cases set forth by this Court in *Sampson v. Murray*, 415 U.S. 61 (1974), applies where government employees seek preliminary injunctive relief pursuant to the federal Age Discrimination in Employment Act to enjoin state officials from enforcing a state statute requiring the mandatory retirement of state police officers.

## List of Parties

The parties to the proceeding below were petitioners Commonwealth of Massachusetts; Thomas Rapone, Secretary of the Massachusetts Executive Office of Public Safety; and Francis McCauley, Executive Director of the Massachusetts Retirement Board. When the complaint was originally filed, the respondents included Daniel J. Gately and 44 others, as set forth in the Appendix at A-52. The complaint was subsequently amended to include 56 additional respondents, who are listed in the Appendix at A-52-53. On November 3, 1993, the District Court allowed the motion of the Equal Employment Opportunity Commission to appear as an Intervenor.

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COMMONWEALTH OF MASSACHUSETTS, ET AL.,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, the Commonwealth of Massachusetts; Thomas Rapone, Secretary of the Massachusetts Executive Office of Public Safety; and Francis McCauley, Executive Director of the Massachusetts Retirement Board respectfully pray that, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a writ of certiorari issue to review the opinion of the United States Court of the Appeals for the First Circuit, entered in the above-entitled case on August 18, 1993.

## Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 2 F.3d 1221 (1st Cir. 1993), and is reprinted in the Appendix hereto, A-1.

The Memorandum and Order of the United States District Court for the District of Massachusetts is reported at 811 F. Supp. 26 (D. Mass. 1992). It is reprinted in the Appendix hereto, A-31.

## Jurisdiction

On December 30, 1992, the United States District Court for the District of Massachusetts entered an order preliminarily enjoining petitioners from enforcing the statutorily mandated retirement of members of the Massachusetts State Police at age 55. A-45. On August 18, 1993, the Court of Appeals for the First Circuit affirmed the decision of the District Court. A-1. Petitioners sought reconsideration through a timely petition for rehearing and suggestion for rehearing in banc; and, on October 18, 1993, the First Circuit denied the petition. A-49. On December 28, 1993, Justice Souter granted petitioners' application for an extension of time until March 14, 1994, to file a petition for writ of certiorari. A-51.

The jurisdiction of this Court to review the opinion of the First Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

## Statutes Involved

Mass. St. 1991, c. 412, §§ 1, 122, 123, are set forth in their entirety in the Appendix at A-54-56.

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, provides in material part as follows.

> § 626. *Recordkeeping, investigation, and enforcement*
>
> . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

## Statement of the Case

In December, 1991, the Massachusetts Legislature enacted St. 1991, c. 412, requiring the consolidation of four state law enforcement agencies — the Division of State Police, the Metropolitan District Police ("MDC"), the Registry of Motor Vehicles Law Enforcement Division ("Registry") and the Capitol Police ("Capitol") — into one Department of State Police. Chapter 412 further requires the mandatory retirement of members of the Department of State Police at age 55, effective December 31, 1992. St. 1991, c. 412, §§ 122-123. Prior to the consolidation, members of these four law enforcement agencies were all subject to mandatory retirement by

statute. Members of the Division of State Police were mandatorily retired by statute at age 50, and members of the three other law enforcement agencies were mandatorily retired by statute at age 65.[1]

Invoking federal jurisdiction pursuant to 28 U.S.C. § 1331, respondents brought this action on December 21, 1992, in the United States District Court for the District of Massachusetts, alleging that Chapter 412, § 122, violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* Respondents sought preliminary injunctive relief, including an injunction restraining petitioners from retiring members of the state police at age 55. Petitioners opposed the motion for a preliminary injunction on the grounds that: (1) under the standard set forth in *Sampson v. Murray*, 415 U.S. 61 (1974), respondents had failed to demonstrate irreparable harm; (2) granting the requested injunctive relief would inflict significant harm on petitioners and would adversely affect the public interest because it would impermissibly interfere with the consolidation process mandated by the state legislature; and (3) respondents had failed to demonstrate a likelihood of success on the merits because the First Circuit had previously determined

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[1] In *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984), the Court of Appeals for the First Circuit rejected a challenge under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, to the mandatory retirement age of the Massachusetts Division of State Police in effect at that time, holding that age 50 is a bona fide occupational qualification for the State Police. *See also EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986)(giving *stare decisis* effect to *Mahoney v. Trabucco*, and rejecting subsequent challenge to mandatory retirement age for members of the Division of State Police).

that age 50 was a bona fide occupational qualification for the Massachusetts State Police and a 1986 Amendment to the ADEA, Pub. L. No. 99-592 § 3(b), temporarily exempted the retirement of law enforcement personnel from the scope of the ADEA.

On December 30, 1992, after a hearing, and one day before the effective date of the mandatory retirement age provision, the District Court issued a preliminary injunction, enjoining petitioners from enforcing the statute. A-45.[2] In determining whether respondents had made the requisite showing of irreparable harm sufficient to justify injunctive relief in a government personnel case, the District Court did not indicate that it was applying the heightened standard for irreparable harm set forth in *Sampson v. Murray*, 415 U.S. 61 (1974). Rather, the District Court stated:

> Plaintiffs' claims of irreparable injury focus mainly upon the loss of status and satisfaction in their work they will suffer if they are forced into early retirement. This is harm for which money does not adequately compensate. As the defendants correctly note, reliance on this factor might mitigate in favor of an injunction in every employment discharge case. However, given the balancing nature of the second factor in the preliminary injunction test, this is not necessarily a drawback.

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[2] On November 24, 1993, the District Court amended the order as set forth in the Appendix at A-47.

A-34.[3]

In affirming the District Court, however, the Court of Appeals expressly declined to apply the heightened standard of irreparable harm set forth in *Sampson*. While the Court of Appeals noted that "numerous other courts have assumed that the 'genuinely extraordinary' test for irreparable harm applies in all employee discharge cases," the court criticized this approach stating, "Such a conclusion is predicated, in our opinion, upon an overly broad, and faulty, interpretation of *Sampson*'s holding." A-25-26 (citations and footnote omitted). In contrast to other circuit courts of appeals, the First Circuit, adopting a narrow interpretation of *Sampson*, decided that the heightened standard of irreparable harm would apply only where a plaintiff who had failed to exhaust administrative remedies sought to enjoin his employer from terminating his employment. A-24-26 and n. 8. Thus, the Court of Appeals applied a lower standard for irreparable harm and determined that respondents had made a sufficient showing to warrant an injunction against the state statute. A-29.

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[3] The District Court did cite *Sampson* for the limited proposition that a drop in income is not considered an irreparable injury warranting injunctive relief. See, A-35.

## Reasons for Granting the Writ

The Court should grant this Petition to resolve a conflict among the circuits as to the proper degree of irreparable harm necessary to support a preliminary injunction against the government in an employment case. In *Sampson v. Murray*, this Court articulated a heightened standard to demonstrate irreparable injury sufficient to justify preliminary injunctive relief in government personnel cases. 415 U.S. 61 (1974). Following *Sampson*, some federal courts have applied the heightened standard for irreparable harm where government employees are seeking preliminary injunctive relief. However, the Court of Appeals for the First Circuit, in affirming the District Court's Order and determining that respondents had made the requisite showing of irreparable harm, expressly declined to apply the heightened *Sampson* standard. By applying an unduly narrow interpretation of *Sampson*, and holding that the "genuninely extraordinary" standard for irreparable harm set forth in *Sampson* did not apply to respondents' application for preliminary injunctive relief, the Court of Appeals' decision creates a conflict among the circuit courts of appeals that should be resolved by this Court.

## THE COURT OF APPEALS' APPLICATION OF *SAMPSON V. MURRAY* CREATES A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

### A. *Sampson v. Murray* Requires A Heightened Standard For Irreparable Harm Sufficient To Warrant Preliminary Injunctive Relief In Government Personnel Cases.

In *Sampson v. Murray*, this Court held that a government employee must satisfy a heightened standard of irreparable injury in order to justify preliminary injunctive relief against his employer. 415 U.S. 61 (1974). While recognizing that federal courts were not "totally without authority to grant interim injunctive relief to a discharged Government employee" (*id.* at 63), this Court stated:

> [W]e do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases.

*Id.* at 84. The factors cited by the Court include the "obvious disruptive effect" that the granting of a preliminary injunction would have on a matter where an administrative appeal is pending, the "well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs . . . and the traditional unwillingness of courts of equity to enforce contracts for personal services either at the behest of the employer or the employee." *Id.* at 83 (citations omitted).

In *Sampson*, this Court reversed the Court of Appeals for the District of Columbia and held that the plaintiff was not entitled to a preliminary injunction enjoining the termination of her employment. While the Court indicated in a footnote that it did not "wish to be understood as foreclosing relief in the genuinely extraordinary situation" (*id.* at 92 and n. 68), the Court held that the showing made by the plaintiff — including that the impending discharge would result in a loss of income and damage to her reputation — "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." *Id.* at 91-92.

In declining to apply the heightened standard for irreparable harm articulated in *Sampson* to this case, the Court of Appeals improperly limits the holding of *Sampson* to apply only to those cases where a plaintiff, seeking to enjoin an adverse action by the employer, has failed to exhaust administrative remedies. A-24-26 and n. 8. While exhaustion of remedies is one of the factors cited in *Sampson*, this Court's analysis is not limited to that one factor. Rather, in articulating the heightened standard for irreparable harm, the Court specifically relies on the traditional unwillingness of courts of equity to enforce personnel service contracts and the wide latitude traditionally granted to the government to manage its own affairs. 415 U.S. at 83. *See also Rizzo v. Goode*, 423 U.S. 362, 378-379 (1976)(where plaintiff seeks to enjoin the activity of a government agency, he must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own affairs)(citations omitted). Indeed, this Court characterizes its decision as requiring "that respondent at the very least must make a showing of irreparable harm sufficient in kind and degree to override these factors

cutting against the general availability of preliminary injunctions in *Government personnel cases."* *Sampson v. Murray*, 415 U.S. at 84 (emphasis added). Accordingly, as shown below, contrary to the Court of Appeals for the First Circuit, courts have applied the heightened *Sampson* standard where a government employee, who has exhausted administrative remedies, is seeking preliminary injunctive relief to enjoin an adverse employment decision.

### B. The Court of Appeals' Decision Creates A Conflict Among the Circuits Since, In Applying *Sampson v. Murray*, Federal Courts Have Required Government Employees Seeking Preliminary Injunctive Relief To Demonstrate Extraordinary Harm Sufficient To Outweigh The Government's Interests.

Following *Sampson*, and contrary to the First Circuit's decision, numerous federal courts have generally applied the heightened standard for irreparable harm where governmental employees are seeking preliminary injunctive relief. Indeed, the heightened *Sampson* standard has been applied where, as here, a plaintiff who has exhausted administrative remedies is seeking a preliminary injunction pursuant to a federal civil rights statute. For example, in *Ekanem v. Health & Hospital Corp. of Marion County*, 589 F.2d 316 (7th Cir. 1978), plaintiff brought a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and under 42 U.S.C. §§ 1981, 1983, 1985(3), and 1988. Prior to filing their lawsuit, plaintiffs had exhausted administrative remedies under Title VII by filing charges with the Equal Employment Opportunity Commission and receiving right to sue letters.

*Ekanem*, 589 F.2d at 317, 318. In reversing the District Court's entry of a preliminary injunction, the Seventh Circuit, citing *Sampson*, held that "[t]he reinstatement remedy is permissible only in the most extraordinary cases." *Id.* at 322. Applying *Sampson*, the Seventh Circuit noted: "It is true that the *Sampson* Court also emphasized the potential disruption of the administrative process if an injunction were to issue in that particular case. However, it is clear from the Court's emphasis on the sufficiency of the backpay remedy (415 U.S. at 90, 94 S.Ct. 937) that its holding as to what is necessary to establish 'irreparable harm' applies to Title VII cases generally." *Id.* at 321, n. 13.[4]

Likewise, in *Stewart v. United States Immigration & Naturalization Serv.*, 762 F.2d 193 (2d Cir. 1985), the Second Circuit, in reversing the entry of a preliminary injunction, assumed that plaintiff had met the jurisdictional requirements for filing a Title VII action, including exhaustion of administrative remedies.[5] The Second Circuit, in reviewing the District

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[4] Similarly, in *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980), plaintiff, a police chief, challenged his mandatory retirement under the Age Discrimination in Employment Act. The District Court entered preliminary injunctive relief mandating plaintiff's reinstatement. The Court of Appeals for the Seventh Circuit reversed, holding "[r]einstatement pending a trial on the merits, even in cases of race or sex discrimination, is an extraordinary remedy permissible only upon a substantial showing of irreparable injury." *Id.* at 1259.

[5] In *Stewart*, plaintiff claimed that his employer, the Immigration and Naturalization Service, violated Title VII when it suspended his employment. The Court of Appeals for the

Court's Order, rejected the District Court's reasoning that the *Sampson* standard for irreparable harm did not apply because *Sampson* involved lack of procedural due process and discharge in violation of Civil Service Regulations, as opposed to an action under Title VII. Rather, the Court held:

> [I]n *Sampson v. Murray*, . . . the Supreme Court articulated a particularly stringent standard for irreparable injury in government personnel cases. The *Sampson* Court held that, except in a "genuinely extraordinary situation," irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment "however severely they may affect a particular individual."

*Id.* at 199 (citations omitted). *See Sebra v. Neville*, 801 F.2d 1135, 1139 (9th Cir. 1986)(plaintiff, alleging violations of 42 U.S.C. § 1983, sought preliminary injunction to enjoin the California National Guard from transfering him; Court of Appeals for the Ninth Circuit affirmed the denial of the request for preliminary injunctive relief, citing *Sampson* and holding plaintiff had to make a "greater showing of irreparable harm than is required under the traditional standard governing preliminary injunctions"); *see also Garcia v. Lawn*, 805 F.2d

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Second Circuit determined that the District Court did not have jurisdiction over the claim because, although Stewart had previously filed a charge with the Equal Employment Opportunity Commission claiming discrimination in employment, treatment and conditions, he had never filed an administrative charge relating to his suspension. 762 F.2d at 197.

1400 (9th Cir. 1986)(assuming without deciding that *Sampson* standard applies to Title VII cases against the government); *Wagner v. Taylor*, 836 F.2d 566, 575 n. 66 (D.C. Cir. 1987) (not reaching issue of whether *Sampson* standard applies to Title VII case since plaintiff failed to meet lower standard of irreparable harm); *but see EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037, 1040-44 (6th Cir. 1981) (traditional standard for irreparable harm applied in Title VII case); and *EEOC v. Cosmir, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987)(where injunction is authorized by statute and the statutory conditions are satisfied, movant need not establish specific irreparable injury to obtain preliminary injunction).[6]

Accordingly, a conflict exists among the circuit courts of appeals regarding the appropriate standard for demonstrating irreparable harm sufficient to warrant preliminary injunctive relief against the government in an employment case. While the Courts of Appeals for the Second, Seventh and Ninth Circuits apply the heightened *Sampson* standard generally to governmental personnel cases — even where administrative remedies have been exhausted, the Court of Appeals for the

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[6] Numerous district courts have also generally applied the heightened *Sampson* standard to require exceptional circumstances to warrant the entry of a preliminary injunction in an employment case. *See, e.g.*, *Greer v. South Carolina Wildlife and Marine Resources Department*, 632 F. Supp. 903 (D.S.C. 1986); *EEOC v. State of New Jersey*, 620 F. Supp. 977, 995 (D.N.J. 1985); *Nelson v. Baldrige*, 578 F. Supp. 320 (W.D. Mo. 1984); *Ferrell v. Durham Technical Institute*, 569 F. Supp. 16, 19 (M.D.N.C. 1983); and *Theodore v. Elmhurst College*, 421 F. Supp. 355, 358 (N.D. Ill. 1976). *See generally*, Arthur Larson and Lex K. Larson, *Employment Discrimination*, § 54.31(b)(1993) and cases cited.

First Circuit expressly rejected this approach stating, "Such a conclusion is predicated, in our opinion, upon an overly broad, and faulty, interpretation of *Sampson*'s holding." A-26 (footnote omitted). Thus, the First Circuit's application of *Sampson* creates a split among the circuits on an important issue that should be resolved by this Court.

### C. The Harmful Effects Of The Standard For Irreparable Harm Adopted By The First Circuit Are Illustrated By Its Application In This Case.

In failing to apply the heightened *Sampson* standard to this case, the First Circuit affirmed the issuance of a preliminary injunction against a presumptively valid state statute upon a minimal showing of harm. *See generally*, *Rizzo v. Goode*, 423 U.S. 362, 380 (1976)(noting that principles of federalism may prevent certain injunctive relief by a federal court against those in charge of an executive branch of a state agency)(citing *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974)).

The District Court acknowledged that respondents' claims of irreparable harm "are not overwhelming." A-35. Likewise, the Court of Appeals indicated that it "view[ed] the irreparable harm question as a close call." A-29. In determining that a sufficient showing of irreparable harm had been made, however, the Court of Appeals relied on two factual findings made by the District Court. First, the court noted that "reinstatement would not be an available remedy for those . . . who, at the close of a successful trial on the merits, would have reached the new retirement age, and, as a result of their earlier

discharge, would lose their twilight years of employment." A-28. Second, the court found that "time spent away from the force [would] impair [employees'] ability to stay in touch with new developments, especially during this time of transition, thus impairing their effectiveness and that of the State Police as a whole[,] if and when they are ultimately reinstated." *Id.*

Neither of these claims supports a determination of irreparable harm. First, with respect to the issue of whether reinstatement would be an available remedy, the Court of Appeals erroneously assumed that if respondents were successful at trial, a new retirement age would be set. In fact, if respondents were successful at trial, petitioners would be enjoined from retiring respondents at the statutory age of 55 and *no* retirement age would be in effect for the members of the Department of State Police. Accordingly, if respondents were successful at trial, all respondents would be reinstated, regardless of their age.

The Court of Appeals also erred in relying on the argument that time spent away from the force during the transition year would irreparably harm respondents. The concern hypothesized by the court is more accurately viewed as an issue for the Commonwealth, not the respondents: that is, whether or not respondents need additional training upon any reinstatement may present logistical or administrative challenges to the Department of State Police; it does not demonstrate irreparable harm to respondents.

Further, the circumstances described by the First Circuit would pertain to any discharge case, suggesting the improbable result that any employee who has been discharged would be able to demonstrate irreparable harm. This harmful result is avoided by the other circuits' application of *Sampson* since, in

applying the heightened *Sampson* standard, irreparable harm justifying preliminary injunctive relief in an employment case against the government will be warranted only in extraordinary circumstances.

In sum, the decision of the Court of Appeals for the First Circuit affirming the entry of a preliminary injunction enjoining state officials from enforcing the mandatory terms of a state statute departs from the holding of this Court in *Sampson v. Murray* and conflicts with the application of *Sampson* by numerous federal courts. The Supreme Court's review of this decision would resolve the important issue of the proper degree of irreparable harm necessary to support a preliminary injunction against the government in an employment case.

## Conclusion

For all the foregoing reasons, the petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: March 14, 1994

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APPENDIX A

**DANIEL J. GATELY, et al.,**
**Plaintiffs, Appellees,**

**v.**

**COMMONWEALTH OF MASSACHUSETTS, et al.**
**Defendants, Appellants,**

**No. 92-2485.**

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United States Court of Appeals,
First Circuit

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Heard March 2, 1993

Decided Aug. 18, 1993.

Members of the Massachusetts Department of State Police sought preliminary injunction against enforcement of statutory mandated retirement at age 55. Injunction was granted by the United States District Court for the District of Massachusetts, A. David Mazzone, J., 811 F.Supp. 26, and Commonwealth appealed. The Court of Appeals, Stahl, Circuit Judge, held that: (1) prior decisions were not stare decisis as to whether

bona fide occupational qualification ((BFOQ) exception to Age Discrimination in Employment Act (ADEA) applied; (2) mandatory statutory requirement did not come within seven-year grace period under the Act for certain law enforcement officers; (3) "genuinely extraordinary" test for irreparable harm does not apply in all employee discharge cases; and (4) District Court did not abuse its discretion in finding irreparable harm.

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Deborah S. Steenland, Asst. Atty., Gen., with whom Scott Harshbarger, Atty. Gen. and Thomas A. Barnico, Asst. Atty. Gen., Boston, MA, were on brief for appellants.

James B. Conroy, with whom Katherine L. Parks and Donnelly, Conroy & Gelhaar, Boston, MA, were on brief for appellees.

Paul D. Ramshaw, Donald R. Livingston, Gen. Counsel, Gwendolyn Young Reams, Associate Gen. Counsel and Vincent J. Blackwood, Asst. Gen. Counsel, Washington, DC, on brief for the U.S.E.E.O.C., amicus curiae.

Before BOUDIN, Circuit Judge, CAMPBELL, Senior Circuit Judge, and STAHL, Circuit Judge.

STAHL, Circuit Judge.

This is an appeal from a preliminary injunction issued pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, prohibiting defendants-appellants Commonwealth of Massachusetts, Thomas Rapone, Secretary of Public Safety, and Francis McCauley, Executive

Director of the Massachusetts Retirement Board, from enforcing the statutorily mandated retirement of members of the Department of State Police aged 55 or older. For the reasons set forth below, we affirm.

## I.
## FACTUAL BACKGROUND

In December 1991, the Massachusetts legislature enacted 1991 Mass. Acts ch. 412 (effective July 1, 1992), which called for, *inter alia*, the consolidation of the Commonwealth's largest police force, the Division of State Police, with its three smaller forces, the Metropolitan District Commission Police ("MDC"), the Registry of Motor Vehicles Law Enforcement Division ("Registry"), and the Capitol Police. The newly consolidated police force is referred to as the "Department of State Police."[1]

Prior to the consolidation, officers of the MDC, Registry, and Capitol Police were subject of a mandatory retirement age of 65, and officers of the Division of State Police were subject to a mandatory retirement age of 50. Section 122 of Chapter 412 repealed those mandatory retirement ages and declared that all members of the Consolidated Department who reach their fifty-fifth birthday on or before December 31, 1992, shall retire by that date.

On December 21, 1992, ten days before the effective date of the new mandatory retirement age, plaintiffs, members of

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[1] For purposes of clarity, however, throughout this opinion we refer to the new Department of State Police as the "Consolidated Department."

the former MDC and Registry divisions,[2] commenced this action seeking injunctive relief on the grounds that the new mandatory retirement age violated the ADEA. *See* 29 U.S.C. § 623(a)(1). On December 30, 1992, after a hearing that same date, the district court issued an order granting plaintiffs' motion for preliminary injunctive relief. *See Gately v. Massachusetts*, 811 F.Supp. 26 (D.Mass. 1992). This appeal followed.

## II.

## The Preliminary Injunction Standard

In deciding whether to grant a preliminary injunction, a district court must weigh the following four factors: (1) the likelihood of the movant's success on the merits; (2) the potential for irreparable harm to the movant; (3) a balancing of the relevant equities, *i.e.*, "the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld," *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991); and (4) the effect on the public interest of a grant or denial of the injunction. *See, e.g., id.* However, the "*sine qua non* of [the preliminary injunction standard] is whether the plaintiffs are likely to succeed on the merits." *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993). *See also United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987) ("The heart of the matter is whether 'the harm caused plaintiff without the injunction, *in light of* the plaintiff's likelihood of eventual success on the merits, outweighs the harm the injunction will

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[2] The complaint lists 45 officers, 30 of whom reached the age of 55 or older on December 31, 1992.

cause defendants.'") (*quoting Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162 (1st Cir. 1987)(emphasis in original)).

A party appealing a grant of a preliminary injunction bears the heavy burden of showing that the district court either committed a mistake of law or abused its discretion. *Guilbert*, 934 F.2d at 5. *See also K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) ("Decisions as to granting or withholding injunctive redress can best be made by trial courts steeped in the nuances of a case and mindful of the texture and scent of the evidence."). Without such a showing, we will not disturb the ruling below. *Id.*

Here, the district court weighed the four criteria recited above and held that the scales tipped in favor of an injunction. *See Gately*, 811 F.Supp. at 27-31. Although the court admitted that the evidence relative to the second, third, and fourth criteria was not markedly in either party's favor, it found that plaintiffs would likely succeed on the merits. *Id.* at 31. Accordingly, it issued the requested preliminary injunction.

On appeal, defendants generally challenge the court's application of all four criteria. Having reviewed the district court' opinion, however, it is clear to us that appellate elaboration is warranted only as to the first and second criteria. We therefore adopt the district court's cogent and well-reasoned opinion insofar as it relates to the other two prongs of the preliminary injunction test and focus on whether the court correctly presaged (a) plaintiffs' likelihood of success at trial, and (b) the potential for irreparable harm to plaintiffs in the absence of an injunction.

## III.
## Discussion

A. *Plaintiffs' Likelihood of Success*

Under the ADEA, it is "unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age ...." 29 U.S.C. § 623(a)(1). The ADEA contains an "escape clause," however, which allows employers some limited flexibility to take age into consideration in business decisions. Commonly referred to as the "BFOQ exception," the clause allows employers "to take any action otherwise prohibited under [the statute] ... where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business ...." 29 U.S.C. § 623(f)(1). As noted by the Supreme Court, this clause is "'an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412, 105 S.Ct. 2743, 2751, 86 L.Ed.2d 321 (1985) (*quoting Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977).

In *Criswell*, the Court enunciated a two-pronged test for courts to use in discerning the width of the "extremely narrow" BFOQ exception. *Id.* at 412-20, 105 S.Ct. at 2750-55 (adopting the two-part test outlined in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976)). Under the first prong, the employer must be able to show that the qualification at issue is "*reasonably necessary* to the essence of [its] business ...." *Criswell*, 472 U.S. at 413, 105 S.Ct. at 2751 (quoting *Usery*, 531 F.2d at 236)(emphasis in original); *EEOC v. City of East Providence*, 798 F.2d 524, 528 (1st Cir.

1986)(quoting *Criswell*). The second prong requires that the employer justify its use of age as a proxy for that qualification. *Criswell*, 472 U.S. at 414, 105 S.Ct. at 2751; *City of East Providence*, 798 F.2d at 528. Justification can be accomplished in one of two ways. The employer can show that it "'had reasonable cause to believe, that is, a *factual basis* for believing, that all or substantially all persons over the age qualification[] would be unable to perform ... the duties of the job involved.'" *Criswell*, 472 U.S. at 414, 105 S.Ct. at-2751-52 (quoting *Usery*, 531 F.2d at 235) (emphasis added). Alternatively, the employer can establish that "it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Criswell*, 472 U.S. at 414, 105 S.Ct. at 2752 (quoting *Usery*, 531 F.2d at 235).

As support for their contention that the district court erred in determining plaintiffs' likelihood of success under the ADEA, defendants make the following two arguments: (1) controlling precedent in this circuit forecloses plaintiffs' claims, *see EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986)("*Trabucco II*"); *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984)("*Trabucco I*"); and (2) plaintiffs' claims are barred by a 1986 amendment to the ADEA. *See* 29 U.S.C. § 623(j). We address each argument in turn.

**1. Trabucco I and II**

Defendants first contend that plaintiffs' challenge to chapter 412 is precluded by the doctrine of *stare decisis*. In so doing, they rely upon a case in which we upheld a lower court's finding that the Massachusetts State Police's statutorily mandated retirement age of 50 was a BFOQ, *see Trabucco I*,

738 F.2d at 37-42, and a case in which we subsequently reaffirmed *Trabucco I* on *stare decisis* principles. *See Trabucco II*, 791 F.2d at 2-5. Defendants' reliance upon these cases is misplaced.

The doctrine of *stare decisis* renders the ruling of *law* in a case binding in future cases before the same court or other courts owing obedience to the decision. "[U]nlike the doctrines of *res judicata* and collateral estoppel, [the doctrine of *stare decisis*] is not narrowly confined to parties and privies, and it does not draw its force from the policy protecting final judgments." *Trabucco II*, 791 F.2d at 2. "Rather, when its application is deemed appropriate, the doctrine is broad in impact, reaching strangers to the earlier litigation." *Id.*

The essential principles of *stare decisis* may be described as follows:

> (1) an issue of law must have been heard and decided; (2) if an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed; (3) a decision is *stare decisis* despite the contention that the court was not properly instructed by counsel on the legislative history, or that the argument was otherwise insufficient; (4) a decision may properly be overruled if seriously out of keeping with contemporary views passed by in the development of the law or proved to be unworkable; and (5) there is a heavy presumption that settled issues of law will not be reexamined.

*Trabucco II*, 791 F.2d at 4 (internal quotations and citations omitted). Fidelity to this principle promotes "stability,

predictability, and respect for judicial authority." *Hilton v. South Carolina Pub. Rys. Comm'n*, —U.S. —, —, 112 S.Ct. 560, 564, 116 L.Ed.2d 560 (1991).

As *stare decisis* is concerned with rules of law, however, a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record. *Complaint of Tug Helen B. Moran, Inc.* 607 F.2d 1029, 1031 (2d Cir. 1979). *Cf. Gavin v. Chernoff* 546 F.2d 457, 458-59 (1st Cir. 1976)(invoking *stare decisis* to follow earlier opinion where "appellants' essential arguments remain much the same as those considered and [previously] rejected [, and] [t]here are no compelling new reasons and no change in circumstances justifying reconsideration of the previous decision")(internal quotation marks omitted).

A brief examination of the two cases relied upon by defendants reveals the inapplicability of the doctrine here. In *Trabucco I*, the district court had held that Mass. Gen.L. ch. 32, § 26(3)(a), which mandated retirement at age 50 for the Division of State Police, while a valid BFOQ for the Division generally, violated the ADEA as applied to the plaintiff, a state trooper who had a desk job. We reversed, holding that the age qualification applied to all members of the state police, regardless of whether they had field or desk jobs. *Trabucco I*, 738 F.2d at 39 (phrase "'occupational qualification' means more of a recognized and discrete vocation rather than a desk assignment for an employee subject to all the obligations and benefits of a quasi-military organization"). Our decision left intact, however, the district court's finding that age 50 was a BFOQ for the Division of State Police. *Id.* at 37.

After the district court ruling, but before our reversal, the EEOC brought an action challenging the very same mandatory retirement statute. The district court, relying upon *Trabucco I*, held that the action was foreclosed by principles of *stare decisis*. On appeal, the EEOC contended that, because plaintiff Mahoney had offered no evidence at trial to rebut the Commonwealth's BFOQ evidence, the decision lacked precedential value. *Trabucco II*, 791 F.2d at 4. No facts had changed and the EEOC argued no new law. It simply contended that it would offer the expert testimony that had not been presented by plaintiff Mahoney. Although recognizing the "non-absoluteness of *stare decisis*," *id.* at 4, we analyzed the proceedings below and found that Mahoney raised and argued, and the district court decided, the precise question of whether the across-the-board BFOQ was valid. *Id.* at 4-5 ("Thus, the issue in the case at bar was addressed by *Mahoney* in his litigation, even if not as thoroughly as the EEOC would have desired."). As a result, we rejected the EEOC's attempt to reopen that issue. *Trabucco II*, 791 F.2d at 4-5 ("We have found no case, nor has appellant cited us to any, that supports its contention that a weak or ineffective presentation in a prior case deprives the ruling of precendential effect.").[3]

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[3] In so doing, we observed that counsel for the EEOC was not only aware of the [*Trabucco I*] litigation, but could have intervened in the district court or could have filed an amicus brief on appeal. That it did neither was attributed to its assessment that the decision would not be given *stare decisis* effect and to certain practical problems, such as obtaining expert witnesses. *Trabucco II*, 791 F.2d at 4.

There are two compelling reasons why these cases do not foreclose the instant action. First, the question of whether a mandatory retirement age is a BFOQ is a fact-intensive inquiry. *See Criswell*, 472 U.S. at 417-23, 105 S.Ct. at 2753-56 (discussing the fact-based nature of the BFOQ defense); *Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353, 362, 105 S.Ct. 2717, 2722, 86 L.Ed.2d 286 (1985)(stressing the "particularized, factual showing" required by the ADEA of an employer claiming an age qualification is a BFOQ); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1216 (9th Cir.)("The validity of a BFOQ turns upon factual findings, preferably ones by a jury."), *cert. denied*, 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988); *Muniz Ramirez v. Puerto Rico Fire Serv.*, 757 F.2d 1357, 1358 (1st Cir. 1985)("We must reject appellant's attempt ... to have us rule as a matter of law that an entry age of thirty-five for firefighters is a BFOQ. A particular age limit for entry into a particular position is a matter of proof."). *See also Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 405 (7th Cir. 1984)("a once-valid BFOQ may lose its justification with advances in medical science. That the age 60 rule may have been a BFOQ in 1978 does not place it beyond challenge [in 1983]"), *cert. denied*, 470 U.S. 1004, 105 S.Ct. 1356, 84 L.Ed.2d 378 (1985). Here, the facts—as found by the district court—differ from those underlying *Trabucco I and II* in one crucial respect. In the instant case, plaintiffs presented the district court with evidence, not available to the plaintiffs in *Trabucco I and II*, suggesting that age is not an effective proxy for determining an individual's suitability to serve in a public safety job. *See* Frank J. Landy et al., *Alternatives to Chronological Age in Determining Standards of*

*Suitability for Public Safety Jobs* (January 31, 1992). And, as it made clear below, the district court found this evidence persuasive. *See Gately*, 811 F.Supp. at 31 ("Here ... the most thorough and authoritative evidence presented states unequivocally that currently available tests are more effective than age in identifying officers who may be unable to perform the law enforcement and public safety tasks required of them."). We see no abuse of discretion in the district court's evaluation of this evidence.

Second, not only are the underlying facts in this case different from those present in *Trabucco I and II*, but the legal landscape has been altered in critical respects as well. In *Trabucco I*, which was decided prior to the Supreme Court's most recent pronouncements on the ADEA, *see supra* pp. 1225-26, this court applied a standard more lenient than that subsequently adopted by the Supreme Court to determine—under the first prong of the test—whether age was a BFOQ. In *Trabucco I*, we held that an employer must show that the age qualification is "reasonably related" to the operation of its business. *Trabucco I*, 738 F.2d at 37. A year later, the Supreme Court clarified that "[t]he BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness." *Criswell*, 472 U.S. at 419, 105 S.Ct. at 2754. *See id.* at 414, 105 S.Ct. at 2751 (explaining further that "age qualifications [must] be something more than 'convenient' or 'reasonable'...."). The Court also reiterated that "the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." *Id.* at 412, 105 S.Ct. at 2751 (quoting *Dothard*, 433 U.S. at 334, 97 S.Ct. at 2729).

Further, in a case issued the same day as *Criswell*, the Court elaborated on the evidentiary standard which must be met in these cases, stressing that an employer must make a "particularized, factual showing" that age is an effective proxy for the qualification at issue *Johnson*, 472 U.S. at 362, 105 S.Ct. at 2722.

In light of *Criswell* and *Johnson*, we agree with the district court's conclusion that *Trabucco I*, which was decided under the more lenient "reasonable relation" standard, and was based on less than the required "particularized, factual showing," has been called into question. *See Gately*, 811 F.Supp. at 30.

In sum, therefore this case involves a different set of facts, a newly crafted set of legal rules, and, as such, legal issues of first impression for this court. As a result, *stare decisis* does not provide a basis for avoiding a trial on the merits.

**2. The 1986 Amendment to the ADEA**

Defendants next urge the application of 29 U.S.C. § 623(j), a 1986 amendment to the ADEA which, they contend, forecloses plaintiffs' claims. We disagree.[4]

The task of statutory interpretation begins with the language of the statute, and statutory language must be accorded its ordinary meaning. *See, e.g. Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 706 (1st Cir. 1992). Section 623(j) provides in relevant part:

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[4] Although the district court did not address the applicability of this amendment, it is purely a matter of statutory interpretation, and therefore a question of law which we can review in the first instance. *Cf. In re Erin Food Servs., Inc.*, 980 F.2d 792, 799 (1st Cir. 1992).

> Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983[.]
>
> It shall not be unlawful for an employer which is a State ... to discharge any individual because of such individual's age if such action is taken —
>
> (1) with respect to the employment of an individual ... as a law enforcement officer and the individual has attained the age of ... retirement of effect under applicable State or local law on March 3, 1983, and
>
> (2) pursuant to a bona fide ... retirement plan that is not a subterfuge to evade the purposes of this chapter.[5]

This amendment, which took effect on January 1, 1987, and expires on December 31, 1993, gives states and local officials a seven-year transition period within which they can lawfully retire law enforcement officers pursuant to a retirement plan in effect on March 3, 1983. It was on that date that the Supreme Court decided, in the seminal case of *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18

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[5] The term "law enforcement officer" is defined as:

> [A]n employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position....

(1983), that the ADEA's prohibition against mandatory retirement was applicable to state and local governments.

According to defendants, this statute permits them to apply Chapter 412 to plaintiffs because (a) Mass.Gen.L. ch. 32, § 26(3)(a), *in effect* on March 3, 1983, mandated retirement at age 50 for the members of the former Division of State Police; (b) although Chapter 32 § 26(3)(a) was not applicable to these specific plaintiffs on that date, it was applicable to the members of the former Division of State Police; and (c) the duties formerly assigned the Division of State Police have now been assumed by the members of the Consolidated Department. In effect, therefore, defendants contend that §623(j) allows them to take a group of officers who, in 1983, were subject to retirement at age 65, give them a new title in 1992, and, in so doing, subtract 10 years from their retirement age.

The plain meaning of the statutory language simply does not support this result. Until its expiration on December 31, 1993, the statute allows states to retire an individual law enforcement officer on the basis of age if "the *individual* has attained the age of ... retirement *in effect* under *applicable* state of local law on March 3, 1983...." 29 U.S.C. §623(j)(1)(emphasis added). On March 3, 1983, the statute applicable to *plaintiffs* required them to retire at age 65. Therefore, as plaintiffs have not "attained the age of ... retirement in effect under applicable state or local law on March 3, 1983," § 623(j) does not give defendants the refuge they seek.

To be sure, the phraseology is not a model of clarity. Yet, in their effort to read a loophole into § 623(j), defendants ignore the word "individual," which appears four times in the statute. When read as a whole, we believe that the language

compels the conclusion that the word "applicable" means "applicable to the individual."[6]

Even if we were to construe that statute as being ambiguous, however, we do not believe that defendants' interpretation is consistent with the statute's purpose. As explained by Senator Wendell Ford of Kentucky, one of the primary architects of the final compromise version of this statute, Congress intended § 623(j) "to provide relief to those jurisdictions which were forced to respond to [*EEOC v Wyoming*], while at the same time ensuring that no lesser discrimination protection will be provided *for these workers* than what was in effect at the time [*EEOC v. Wyoming*] was decided." 132 Cong.Rec. S16850-02 (daily ed. October 16, 1986)(emphasis added).

The statute, therefore, was enacted to give states a grace period of seven years during which time certain retirement plans for law enforcement officers would be exempted from the ADEA's reach. Senator Ford explained that the statute froze pre-existing age caps but did not exempt from scrutiny stricter age caps subsequently enacted:

> [T]his compromise establishes a *floor* for the hiring and retirement requirements which a State or local government can set. The hiring and retirement age requirements of a plan in effect as of March 3, 1983 become the *floor* for

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[6] We want to make clear, however, that we do not read § 623(j)(1) as allowing those officers who may have elected to transfer out of the MDC, Registry, or Capitol Police and into the Division of State Police to claim the retirement age applicable to them on March 3, 1983.

> allowable plans.... If jurisdictions have raised or eliminated mandatory retirement ages after this date, they have the choice of either moving back to the plan requirements in effect on March 3, 1983, or remaining where they are. However, States and local governments would not be able to *lower* retirement age requirements below what was [sic] in effect as of March 3, 1983.

*Id.* (emphasis added).

Thus, in our view, neither the language of the statute nor its legislative history supports the position advanced by defendants. This statute was enacted to provide an exception, limited in both purpose and duration, to the ADEA's prohibition on mandatory retirement. The Commonwealth's reliance upon this limited exception to insulate from review its adoption of a new retirement policy which subtracts ten years from the retirement age statutorily applicable to plaintiffs on March 3, 1983, is therefore misplaced.

In a last ditch attempt, however, to persuade us of § 623(j)'s applicability, defendants alternatively argue that the statute is ambiguous, and, as such, any ambiguity must be resolved in the Commonwealth's favor. In support of their position, defendants cite *Gregory v. Ashcroft*, —U.S.—, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), in which the Supreme Court held that the ADEA did not preempt a state constitutional provision mandating the retirement of state judges at age 70. *Id.*, —U.S. at—, 111 S.Ct. at 2408 (construing the "policymaking" exception in § 630(f)). In that case, the Court reasoned that state judges are among those "'officers who participate directly in the formulation, execution, or review of

broad public policy [and thus] perform functions that go to the heart of representative government.'" *Id.*, —U.S. at—, 111 S.Ct. at 2402 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973)). The power of the people of a state to "determine the qualifications of their most important government officials" is, the Court held, fundamental to our federalist system. *Id.* Thus, courts should not, according to *Gregory*, construe federal statutes to infringe on that power unless Congress expresses its intent to do so in the plainest terms. *Id.*, —U.S. at — - —, 111 S.Ct. at 2401-03. Finding the text of § 630(f) ambiguous on the question of whether Congress intended to exempt state judges, the Court applied the "plain statement" rule, reasoning that "[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions...." *Id.*, —U.S. at ——, 111 S.Ct. at 2406.

We have recently discussed the limited scope of the Court's holding in *Gregory*. *See EEOC v. Massachusetts*, 987 F.2d 64, 67-70 (1st Cir. 1993). In that case, we reversed the district court's decision, based on its reading of *Gregory*, that the ADEA did not preempt a state statute requiring annual medical examinations for its employees at age seventy. We reasoned that, although the *Gregory* court was "unwavering in its desire to protect state sovereignty and principles of federalism," it made "unequivocally clear ... the narrowness of its holding." *EEOC v. Massachusetts*, 987 F.2d at 68, 69 ("At no point did the Court suggest that all state regulations of public employees are questions at the heart of state sovereignty.").

We likewise reject defendants' arguments that *Gregory*'s "plain statement" rule bars plaintiffs' cause of action. As discussed above, we find no ambiguities in the text of § 623(j) which give us pause as to its applicability here. *See Gregory*, —U.S.—, 111 S.Ct. at 2406 (explaining that "plain statement" rule is "a rule of statutory construction to be applied where statutory intent is ambiguous"). *See also Hilton*, —U.S. at —, 112 S.Ct. at 566 (reiterating the same). Moreover, unlike the statutory exemption at issue in *Gregory*, § 623(j) makes plain Congress' intent that the ADEA protect law enforcement officers from forced retirement in cases where the retirement plan at issue is more restrictive than that in effect on March 3, 1993, or is a "subterfuge to evade the purposes" of the ADEA.

In any event, we think defendants give *Gregory* far too broad a reading. Plaintiffs, unlike the state judges at issue in *Gregory*, are not "constitutional officers" who "participate directly in the formulation, execution, or review of broad public policy ...." *Gregory*, —U.S. at — - —, 111 S.Ct. at 2401-02. Thus, the Court's concern with federal infringement of a core function going to the "heart of representative government" is not present here. For these reasons, therefore, we decline to apply *Gregory* in the manner urged by defendants.

Accordingly, we find no abuse of discretion or mistake of law in the district court's conclusion that there was a likelihood that plaintiff would succeed on the merits. We turn now to the question of irreparable harm.

B. *The Potential for Irreparable Harm*

Defendants also contend that plaintiffs failed to make the requisite showing of irreparable harm, and that the district

court, therefore, abused its discretion in granting plaintiffs' motion for injunctive relief. In so doing, defendants rely principally upon *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), which they assert foreclosed plaintiffs' claims. Because this court has not yet had occasion to engage in a detailed analysis of *Sampson*, and this case calls for a careful reading of the opinion, we begin with a discussion of that case.

In *Sampson*, the Supreme Court held that a probationary federal employee, who sought to enjoin her dismissal from employment pending an administrative appeal to the Civil Service Commission ("CSC"), had to make a particularly strong showing of irreparable harm to obtain preliminary relief. *Sampson*, 115 U.S. at 91-92, 94 S.Ct. at 953-54. The critical facts are as follows. Upon her dismissal from the defendant government agency, the plaintiff filed an administrative appeal with the CSC, alleging that the agency, in dismissing her, had failed to follow applicable federal regulations. Subsequently, she filed an action in federal district court seeking reinstatement while her administrative appeal was pending. In her complaint, she alleged that the dismissal would deprive her of income and cause her to suffer the embarrassment of being wrongfully discharged. Finding that plaintiff might suffer irreparable harm before the CSC could consider her claim, the district court granted the injunction, and the Court of Appeals affirmed. *Id.* at 66-67, 94 S.Ct. at 941-42. The Supreme Court reversed, concluding that the harm plaintiff alleged she would suffer was not irreparable. *Id.* at 91-92, 94 S.Ct. at 953-54.

The questions presented on appeal were twofold: (1) whether the district court had authority to issue the injunction,

an (2) if so, whether the injunction was warranted. The Court stated early in its opinion that the two questions were analytically related and could not be neatly "bifurcated." *Id.* at 68, 94 S.Ct. at 942. Accordingly, discussion of the one makes little sense in the absence of any mention of the other.

Although the Court ultimately answered the first question in the affirmative, it did so only after noting the multiple factors which weighed against a finding that the district court had authority to award the injunction at issue. Those factors included: (1) the fact that plaintiff was seeking relief prior to having exhausted her administrative remedies, and the concomitant "disruptive effect which the grant of the temporary relief ... was likely to have on the administrative process," *id.* at 83, 94 S.Ct. at 949; (2) the lack of any express statutory basis for the injunction; (3) the absence of any case law supporting this particular injunction; (4) "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs," *id.* at 83, 94 S.Ct. at 949 (internal quotations omitted); and (5) the fact that plaintiff was a probationary employee entitled to few procedural rights under the relevant regulations, *id.* at 81-82, 94 S.Ct. at 948-49. Despite these considerations, however, the Court conceded the district court's limited authority to issue a injunction in this type of case, stating that it was "not prepared to conclude that Congress in this class of cases has *wholly* divested the district courts of their customary authority to grant temporary injunctive relief ...." *Id.* at 80, 94 S.Ct. at 948 (emphasis added).

Importantly, the Court then admonished district judges that, although the factors listed above did not render them "wholly

bereft of the authority" to grant injunctive relief "in this class of cases," they could not exercise that authority "without regard to those factors." *Id.* Indeed, the Court declared that those factors "are entitled to great weight in the equitable balancing process which attends the grant of injunctive relief." *Id.*

Before turning to the dispositive second question, i.e., whether injunctive relief was warranted, the Court again reiterated the close analytical relationship between the first and second questions:

> Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that [plaintiff] at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases.

*Id.* at 84, 94 S.Ct. at 950.

In analyzing the second question, the Court first noted the complete absence in the record, with the exception of certain statements in plaintiff's unverified complaint, of any evidence of irreparable harm. *Id.* at 89-91, 94 S.Ct. at 952-53. The Court of Appeals had held that, at that stage of the proceedings, the district court did not need to find that plaintiff was actually irreparably harmed, and that, in any event, plaintiff's allegations afforded a basis for such a finding. The Court disagreed on both counts.

First, the Court stated unequivocally that irreparable harm is a critical element of any injunctive relief in federal court. *Id.* at 88, 94 S.Ct. at 951. Second, the Court explained that

plaintiff's allegations of temporary loss of income and harm to reputation did not amount to a sufficient showing of irreparable harm. Even under traditional standards, according to the Court, temporary loss of income, which can be recouped at the end of a trial, "does not usually constitute irreparable injury." *Id.* at 90, 94 S.Ct. at 953.[7]

As for plaintiff's allegations of harm to reputation, the Court found them unpersuasive. It was difficult to imagine, according to the Court, how the agency's failure to follow proper procedures in effectuating her discharge could cause harm to plaintiff's reputation, especially where any damage could be undone by an administrative determination in her favor.

The Court assumed, however, for the purposes of its opinion, that plaintiff had made a satisfactory showing of financial and reputational hardship, and then held that such a showing "falls far short of the type of injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." *Id.* at 91-92, 94 S.Ct. at 953. In a footnote following this holding, the Court provided the following caveat:

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[7] This premise had particular force in a Civil Service case, the Court explained, because of the Back Pay Act, 5 U.S.C. § 5596(b)(1), which provides a wrongfully discharged Civil Service employee with full payment and benefits for the time period she was out of work. The Court noted that the Act's legislative history suggested that "Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge." *Id.* at 90-91, 94 S.Ct. at 953.

> We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are difficult to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however, severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case.

*Id.* at 92 n. 68, 94 S.Ct. at 953 n. 68 (*citing Wettre v. Hague*, 74 F.Supp. 396 (D.Mass. 1947), *vacated and remanded on other grounds*, 168 F.2d 825 (1st Cir. 1948).

As we read *Sampson*, it teaches that a federal court cannot dispense with the irreparable harm requirement in affording injunctive relief; that temporary loss of income does not rise to the level of irreparable harm in the usual employee discharge case, *see, e.g. Levesque v. Maine*, 587 F.2d 78, 81 (1st Cir. 1978) (citing *Sampson* and holding that plaintiff's "possible loss of earnings" did not amount to irreparable harm); and that, before enjoining a government agency from dismissing a Civil

Service employee who has not exhausted her administrative remedies, a district court must find that the facts underlying the employee's allegations of irreparable harm are "genuinely extraordinary." *E.g.*, *Soldevila v. Secretary of Agriculture*, 512 F.2d 427, 429-30 (1st Cir. 1975). *Sampson* also stands for the general principle that irreparable harm is subject to a sliding scale analysis, such that the showing of irreparable harm required of a plaintiff increases in the presence of factors, including the failure to exhaust administrative remedies, which cut against a court's traditional authority to issue equitable relief. *See Chilcott v. Orr*, 747 F.2d 29, 31-32 (1st Cir. 1984)("In view of the strong judicial policy against interfering with the internal affairs of the armed forces, we will apply the more stringent test of *Sampson* to applications for preliminary injunction by military personnel."); *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983)("Here, as in *Sampson*, we think that the procedural requirements of Title VII should be considered in the equitable balancing process [and that] an aggrieved person seeking preliminary relief outside the statutory scheme for alleged Title VII violations would have to make a showing of irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process....").

In interpreting *Sampson*, however, numerous other courts have assumed that the "genuinely extraordinary" test for irreparable harm applies in all employee discharge cases, whatever the asserted basis for relief. *See, e.g. Stewart v. United States Immigration & Naturalization Serv.*, 762 F.2d 193, 199-200 (2d Cir. 1985); *E.E.O.C. v. Anchor Hocking Corp.*, 666 F.2d 1037, 1040-44 (6th Cir. 1981). *But see*

*E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987)(holding that irreparable harm is presumed where discharged employee has exhausted her administrative remedies and proceeds under a civil rights statute).

Such a conclusion is predicated, in our opinion, upon an overly broad, and faulty, interpretation of *Sampson*'s holding.[8] As the Court itself made clear early in its opinion, the questions of whether the district court had authority to issue the injunction and whether the irreparable harm finding was proper were not analytically distinct. *Sampson*, 415 U.S. at 68, 94 S.Ct. at 942. The Court reiterated throughout the opinion that the district court should not have weighed the irreparable harm allegations without taking into account the multiple factors rendering tenuous its authority to reinstate a discharged Civil Service employee pending the exhaustion of the administrative appeal process. *See supra* p. 1231. Before leaving the question of the district court's authority, the Court explained that the plaintiff "must make a showing of irreparable injury *sufficient* in kind and degree to *override these factors*...." *Id.* at 84, 94 S.Ct. at 950 (emphasis added). As such, the Court's

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[8] In those cases in which we have applied *Sampson*'s heightened standard, we have relied upon the plaintiff's failure to exhaust available administrative remedies. *See Chilcott*, 747 F.2d at 31-33 (plaintiff airman sought injunction without seeking relief before appropriate Air Force administrative boards); *Bailey*, 722 F.2d at 943-45 (plaintiff sought injunction prior to exhausting Title VII remedies); *Soldevila*, 512 F.2d at 429-30 (plaintiff civil servant sought injunction prior to exhausting CSC appeals process). Thus, the precise question of *Sampson*'s applicability where a plaintiff has no administrative remedies to exhaust is one of first impression in this circuit.

at 84, 94 S.Ct. at 950 (emphasis added). As such, the Court's conclusion that an extraordinary showing of irreparable harm was required to override those factors was hardly surprising.

Needless to say, those factors are not present in all employee discharge cases. And, it makes little sense, in our opinion, to require a district court to weigh all discharged employees' requests for injunctive relief as if they applied. Nothing in *Sampson* suggests that result. Rather, the Court repeatedly referred to the fact-bound nature of its holding. For instance, the Court stated that the plaintiff's showing "falls far short of the type of injury which is a necessary predicate to the issuance of a temporary injunction *in this type of case*." *Id.* at 91-92, 94 S.Ct. at 953-54. And, in the footnote immediately following this holding, the Court stated that "[u]se of a court's injunctive power ..., when discharge of probationary employees is an issue, should be reserved for [the genuinely extraordinary] situation...."[9]

The case before us differs from *Sampson* in several significant respects: (1) plaintiffs are not seeking interim injunctive relief pending the completion of an administrative appeals process; (2) the district court unquestionably had the authority to issue the requested equitable relief, *see* 29 U.S.C. §§ 626(b), (c); (3) plaintiffs' allegations of irreparable harm go

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[9] As support for this holding, the Court cited *Wettre*, 74 F. Supp. at 396, which, like the facts in *Sampson*, involved a discharged civil servant who sought a temporary injunction pending the completion of the administrative appeals process. The *Wettre* court presciently held that, under the circumstances, the complainants' allegations of loss of pay and prestige did not amount to irreparable harm. *Wettre*, 74 F.Supp. at 400-01.

plaintiffs' are not claiming that they are "entitled to additional procedural safeguards in effectuating the discharge." *See Sampson*, 415 U.S. at 91, 94 S.Ct. at 953. Instead, they are arguing that their statutorily-based civil rights will be violated in the event of their discharge. Thus, all the factors which rendered the district court's authority to issue the injunction so tenuous in *Sampson*—factors which the court was required to take into consideration in weighing the plaintiff's irreparable harm allegations—are not present here. We do not think, therefore, that these plaintiffs must meet the same exacting standard required of the plaintiff in *Sampson*, although they clearly must establish irreparable harm, and point to factors sufficient to overcome "the traditional unwillingness of courts of equity to enforce contracts for personal services." *Id.* at 83, 94 S.Ct. at 950.

The district court held below that plaintiffs had made a sufficient, although not overwhelming, showing of irreparable harm. *See Gately*, 811 F.Supp. at 27-28. The Court rested its holding on two factual findings. First, the Court found that reinstatement would not be an available remedy for those plaintiffs who, at the close of a successful trial on the merits, would have reached the new retirement age, and, as a result of their earlier discharge, would lose their twilight years of employment. *Id.* at 27. Second, the Court was persuaded by plaintiffs' argument that, "time spent away from the force [would] impair the plaintiffs' ability to stay in touch with new developments, especially during this time of transition, thus impairing their effectiveness and that of the State Police as a

whole[,] if and when they are ultimately reinstated."[10] *Id.* at 27.

Like the district court, we view the irreparable harm question as a close call. The sole factor cutting against the district court's authority to issue this injunction is the wide latitude traditionally granted the government in dispatching its own internal affairs. *See Sampson*, 415 U.S. at 83, 94 S.Ct. at 949. And, in accordance with *Sampson*'s teachings, the district court took this factor into consideration before granting the injunction. *Gately*, 811 F.Supp. at 28 (balancing the intrusion into internal governmental affairs that would result from the injunction with the harm to plaintiffs in the absence of it, and concluding that any harm to defendants was minimal by comparison). Ultimately, the district court balanced the equities and determined that, in light of plaintiffs' having demonstrated a likelihood of success on the merits, an injunction was warranted.

Mindful of the broad discretion afforded a district court in weighing irreparable harm, *see K-Mart Corp.*, 875 F.2d at 915 (quoting *Wagner v. Taylor*, 836 F.2d 566, 575-76 (D.C.Cir. 1987)), we cannot say that the district court erred in concluding that, under the circumstances, plaintiffs made a sufficient showing of irreparable harm. Accordingly, we affirm the district court's ruling.

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[10] We recognize that the consolidation process had an anticipated completion date of June 30, 1993. On the basis of this record, however, we have no way of determining whether the process has, in fact, been completed.

## IV.
## CONCLUSION

In sum, we find the challenges leveled at the district court's issuance of the preliminary injunction unpersuasive. Accordingly, we affirm the district court's decision. *Affirmed. Costs to appellees.*

**Daniel J. GATELY, et al.**
**Plaintiffs**

**v.**

**COMMONWEALTH OF MASSACHUSETTS,**
**Thomas Rapone, Secretary of**
**Public Safety, and Francis McCauley,**
**Executive Director, Massachusetts**
**State Board of Retirement,**
**Defendants**

**Civ. A. No. 92-13018-MA**

United States District Court,
D. Massachusetts

Dec. 30, 1992.

Police officers sought preliminary injunctive relief from Massachusetts statute mandating retirement of all members of consolidated Department of State Police who were over 54 years old on specified date. The District Court, Mazzone, J., held that officers established likelihood of prevailing on merits of claim that statute violated Age Discrimination in Employment Act (ADEA) and, thus, were entitled to preliminary injunctive relief.

Motion granted.

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James B. Conroy, and Katherine P. Parks, Donnelly, Conroy & Gelhaar, Boston, MA, for plaintiffs.

Thomas A. Barnico, Attorney General's Office, and Deborah S. Steenland, Asst. Atty. Gen., Boston, MA, for defendants.

MEMORANDUM AND ORDER

MAZZONE, District Judge.

This action is brought by officers of the former Metropolitan District Commission Police and Registry of Motor Vehicles Law Enforcement Division. Pursuant to chapter 412 of the Massachusetts Acts of 1991, those forces, along with the Capital Police, are to be merged with the Division of State Police to form the consolidated Department of State Police. *See* 1991 Mass. Act ch. 412, § 1. This consolidation began last July. Section 122 of chapter 412 mandates that all members of the consolidated Department of State police who will have reached their fifty-fifth birthday on or before December 31, 1992 shall retire by the date. The plaintiffs allege that this requirement contravenes the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and request injunctive relief.

The factual background of this case is as follows. Prior to the enactment of chapter 412, the four law enforcement agencies were operated separately. Applicable Massachusetts statutes provided that Metropolitan and Registry officers were required to retire at age 65. *See* Mass.Gen.L. ch. 32, § 69(d) (repealed by ch. 412, effective July 1, 1992). State Police officers were compelled to retire at age 50. *See* Mass. Gen. L. ch. 32, § 26(3)(a); *Mahoney v. Trabucco*, 738 F.2d 35 (1st

Cir.)(applying the rational relation standard to uphold a mandatory retirement age of 50 for the State Police), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984). Chapter 412 mandates retirement at age 55 across the board, thereby adding five years to the employment expectations of former State Police officers, but lopping ten years off those of the former Registry and Metropolitan officers.

The plaintiffs allege that this mandate violates the ADEA, which makes it unlawful for employers to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The defendants respond by arguing that this court's hands are tied by *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984), and *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986), in which the First Circuit rejected challenges under the ADEA to the mandatory retirement of pre-consolidation State Police officers at the age of 50 on the grounds that being younger than 50 was a bona fide occupational qualification ("BFOQ") for that occupation. Because the retirement deadline, December 31, 1992, is imminent, and because the defendants assert that officers age 55 or older who do not retire voluntarily on December 31 will become ineligible for the 80% pension provided in chapter 412, section 122, the plaintiffs request injunctive relief.

In order for a preliminary injunction to issue, the plaintiffs must meet this circuit's well-established four-part standard:

> 1) that plaintiff will suffer irreparable injury if the injunction is not granted; 2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; 3) that plaintiff has exhibited a likelihood of success on the merits; and 4) that the public interest will not be adversely affected by the granting of the injunction.

*Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990)(citing *Women's Community Health Ctr., Inc. v. Cohen*, 477 F.Supp. 542, 544 (D.Me. 1979), quoted in *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981)). Because factors one, two, and four are closely interrelated in this case, they will be dealt with first.

1. *Irreparable Injury*

Plaintiffs' claims of irreparable injury focus mainly upon the loss of status and satisfaction in their work they will suffer if they are forced into early retirement. This is harm for which money does not adequately compensate. As the defendants correctly note, reliance on this factor might mitigate in favor of an injunction in every employment discharge case. However, given the balancing nature of the second factor in the preliminary injunction test, this is not necessarily a drawback.

The oldest plaintiffs would suffer the most if forced to retire: in the event they ultimately prevail and are entitled to be reinstated, that event may occur after they have surpassed the new retirement age, whatever it is determined to be. Thus, depending upon the length of the litigation, reinstatement may not be an available remedy for some plaintiffs. This consideration mitigates in favor of granting injunctive relief.

*Cf., e.g., EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037, 1044 (6th Cir. 1981)(holding that plaintiff failed to make required showing of irreparable harm where reinstatement was available remedy). In addition, time spent away from the force will impair the plaintiffs' ability to stay in touch with new developments, especially during this time of transition, thus impairing their effectiveness and that of the State Police as a whole if and when they are ultimately reinstated.

Although plaintiffs forced to retire would be eligible for a pension equal to 80% of their regular compensation, and might be eligible for unemployment benefits, most of them would probably experience a drop in income. This, however, is not considered an irreparable injury warranting injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

2. *Balancing of Harms*

Although the plaintiffs' claims of irreparable injury are not overwhelming, the harm to them of denying an injunction does seem considerably to outweigh that to the defendants of granting one. Colonel Charles F. Henderson, the Executive and Operational Head of the Department of State Police and the officer in charge of the consolidation, attests that "an order preventing the timely mandatory retirement of officers 55 years of age and older would obstruct and delay the planned implementation of a staffing pattern as authorized by Chapter 412." Affidavit of Colonel Charles F. Henderson, ¶8. However, as Colonel Henderson subsequently notes, only thirty of the plaintiffs in this action are currently fifty-five or older. *Id.*, ¶13. Surely it will not drastically impair "the morale of the rank and file membership," *id.*, ¶8, to continue them in their current positions during the course of this litigation. It is

clear that whether an injunction is granted or not, one side will be greatly inconvenienced, but given that the Commonwealth has long employed Metropolitan, Capitol, and Registry officers between 55 and 65 years of age, some of whom had duties indistinguishable from those of the State Police, *see* Affidavit of Salvatore Colozzi, ¶3, it does not seem unduly burdensome to ask that they be employed a bit longer.

Moreover, it is in the interests of all parties that the consolidated State Police experience as little dislocation as possible during the course of this litigation. The plaintiffs' argument that the potential reinstatement of these officers at some point in the future would cause them, their colleagues, and those who have assumed their commands considerably more disruption than their removal in the event that the defendants ultimately prevail seems convincing.

3. *The Public Interest*

While the public has a compelling interest in the continued efficient provision of law enforcement services, it also has a compelling interest in eradicating age discrimination. It seems unlikely that the presence of thirty extra officers on our streets, albeit officers in their late fifties and early sixties, will appreciably compromise the public safety. The unceremonious sacking of thirty officers who were deemed capable of working until age 65 when they wore the uniforms of the Metropolitan and Registry Police, however, would seem to call into question our commitment to generational fairness.

4. *Likelihood of Success on the Merits*

The question of the plaintiffs' likelihood of success on the merits is a close and complicated one critical to this inquiry. *See Lancor v. Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985)(stating that the First Circuit regards the

probability-of-success factor as critical). A brief survey of the substantive law is therefore in order.

Although the ADEA prohibits employers from firing or otherwise discriminating against employees because of their age, the Act includes a narrow exception. The BFOQ exception to the ADEA provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under ... this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age...." 29 U.S.C. § 623(f)(1).

The defendants argue that this case is controlled by a previous First Circuit case which presented almost exactly the same issues, *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984). In that case, the First Circuit rejected an ADEA challenge to a mandatory retirement age of 50 for preconsolidation State Police officers, accepting the Commonwealth's argument that being under age 50 was a BFOQ for that occupation.[1] In upholding the mandatory retirement statute, the First Circuit applied what it called the

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[1] The main issue in *Mahoney* was whether the word "occupational" in the BFOQ exception to the ADEA should be analyzed broadly, in terms of the qualifications necessary to perform as a generic police officer, or narrowly, in terms of the qualifications necessary to perform a particular assignment, such a liaison officer. The First Circuit held that all State Police officers should be treated as belonging to one occupation, regardless of their particular individual assignments. This holding, however, is not implicated in the case at hand.

"generally-accepted" two-prong test for evaluating the adequacy of a BFOQ defense:

> an employer [1] must show that the age qualification of reasonably related to the essential operation of its business, and [2] must demonstrate[] either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized basis.

*Mahoney*, 738 F.2d at 37 (internal quotations and emphasis omitted). The defendants argue that *Mahoney* is binding on this court under the principles of *stare decisis*, and thus that it determines the outcome of this case.

The controlling Supreme Court cases in the areas of BFOQs are *Western Air Lines, Inc v. Criswell*, 472 U.S. 400, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985), and *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 105 S.Ct. 2717, 86 L.Ed.2d 286 (1985). Those cases settled previously unresolved issues concerning the standards governing the use of the BFOQ defense in cases affecting public safety. *Criswell*, decided the year after *Mahoney*, rejected the lenient reasonable relation standard used by the First Circuit in the first prong of its test. *See Mahoney*, 738 F.2d at 37 (stating that an employer must show that the age qualification is "reasonably related" to the operation of its business). *Criswell* adopted a stricter standard, first articulated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which more closely tracks the language of the ADEA: "[t]he BFOQ standard adopted in the statute is one of 'reasonable necessity,' not

reasonableness." *Criswell*, 472 U.S at 419, 105 S.Ct. at 2754.[2] An age qualification can be reasonably necessary only when the employer has no alternative but to rely on age as a proxy for safety-related job qualifications. *Id.* at 414, 105 S.Ct. at 2751. Using age as a proxy is justified under only two conditions: a) when the employer has "'reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved'"; or b) when "it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Id.* (quoting *Tamiami*)(footnotes and internal quotations omitted). The Supreme Court stated that in order to be valid, "age qualifications [must] be something more than 'convenient' or 'reasonable'...." *Id.* at 414, 105 S.Ct. at 2751. It cautioned that "the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." *Id.* at 412, 105 S.Ct. at 2751 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977)). Thus, while *Criswell* preserved the second prong (with its two alternatives) of the *Mahoney* test intact, it soundly rejected the reasonableness standard of its first prong.

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[2] The First Circuit in *Mahoney* cited *Tamiami* but drew the "reasonably related" language from two other cases, *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 753 (7th Cir. 1983)(disagreed with by *Johnson*), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed.2d 680 (1983), and *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)(an equal protection case).

*Johnson*, which held that a federal statute requiring federal firefighters to retire at 55 did not establish that age as a BFOQ for nonfederal firefighters, is concerned with evidentiary issues. The Court stated there that a "particularized, factual showing" is required in order to uphold an age limit as a BFOQ. *Johnson*, 472 U.S. at 362, 105 S.Ct. at 2722. Furthermore, the age limit must be based on the demands of the occupation, and not on "factors other than conclusive determinations of occupational qualifications...." *Id.* at 369, 105 S.Ct. at 2726. In *Mahoney*, however, the district court relied upon the general findings of an earlier Supreme Court case, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)(decided under the equal protection clause), for its conclusion, adopted by the Court of Appeals, that

> [s]ince physical ability generally declines with age, mandatory retirement at age 50 serves to remove from police service those whose fitness for uniformed work *presumptively* has diminished with age. This clearly is rationally related to the State's objective.

*Mahoney v. Trabucco*, 574 F.Supp. 955, 958 (D.Mass. 1983)(quoting *Murgia*, 427 U.S. at 315, 96 S.Ct. at 2568)(emphasis added), *rev'd*, 738 F.2d 35 (1st Cir. 1984).

In light of *Criswell* and *Johnson* it seems clear that the *Mahoney* decision, based as it was on the reasonable relation standard and lacking particularized factual findings on the necessity of age limitations in preserving public safety, should be reexamined. However, the defendants argue that because *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986), which rejected another ADEA challenge to the same mandatory retirement

*EEOC v. Trabucco* was an attempt to convince the court to reconsider *Mahoney*'s ruling on the basis that there was additional medical evidence which had not been presented in the earlier case. The opinion in *EEOC v. Trabucco* makes no reference to either *Criswell* or *Johnson*, and indeed, the issue of the proper formulation of the first prong of the BFOQ test was not before the court. The issue in *EEOC v. Trabucco* was framed as "whether the principle of *stare decisis* forecloses redetermination of an issue raised, considered, and decided in [*Mahoney*] where the presentation of evidence has been 'one-sided,' with no proffer of rebuttal expert testimony." 791 F.2d at 2. The court held that "a weak or ineffective presentation in a prior case" does no deprive its ruling of precedential effect. *Id.* at 4. The opinion in *EEOC v. Trabucco* noted in passing that *Mahoney* had applied the reasonable relation test, *see* 791 F.2d at 3, but gave no indication the court was aware that the standard had changed in the meantime. Therefore, I believe *Mahoney* and *EEOC v. Trabucco* can no longer be considered preclusive authority for the proposition that State Police officers may be forced to retire as early at age 50, and the principles of *stare decisis* do not apply.

Frankly, the defendants' reliance on *Mahoney*, *EEOC v. Trabucco*, and *stare decisis* is somewhat puzzling. If those cases are still good law, that is, if age 50 is still a BFOQ for being a State Police officer, it is unclear that the Massachusetts legislature is free to raise that age without providing evidence of changed circumstances. Certainly, the defendants have cited no case establishing the proposition that when a BFOQ is decided to be age X, legislators are then free to set mandatory

decided to be age X, legislators are then free to set mandatory retirement at any arbitrarily selected age $X + N$. Indeed, this procedure would vitiate the entire concept of a BFOQ.

Nevertheless, there is post-*Criswell* First Circuit precedent for the proposition that age may sometimes qualify as a valid BFOQ in a law enforcement context. *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986), held that a retirement age of 60 mandated by city ordinance was a BFOQ reasonably necessary to the operation of that city's police force. The main issue presented on appeal was whether the fact that the city did not require any of its officers to meet physical fitness standards precluded the city from insisting in litigation that those standards were reasonably necessary to the operation of the force. The court rejected that argument.

In *East Providence*, however, the court had sufficient basis to make a "supported factual finding that physical prowess and stamina" were necessary job qualifications. *See id.* at 528-29. On the record in this case, that finding would be an impermissible assumption. The court in *East Providence* was also presented with expert medical testimony establishing a factual basis for believing that officers over 60 could not meet the force's physical standards, and for believing that it was impossible to determine officers' fitness on an individual basis.[3] *See id.* at 528. Here, by contrast, the most thorough and authoritative evidence presented states unequivocally that currently available tests are more effective than age in

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[3] Indeed, this evidence was undisputed due to the failure of the EEOC to procure expert rebuttal witnesses in a timely manner. *See East Providence*, 798 F.2d at 527.

Frank J. Landy et al., *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs*, Executive Summary, at 17-18 (1992) [hereinafter "Landy report"]. Furthermore, the fact that East Providence was able to successfully defend an age cap of 60 has no bearing on whether the Commonwealth will be able to justify a cap of 55. The particularized factual findings requirement of *Johnson* obliges each police force to justify its own mandatory retirement age on its own facts. Police forces defending-post-*Criswell* cases in other circuits have found this increasingly difficult to do. *See, e.g., EEOC v. Kentucky State Police Dep't*, 860 F.2d 665 (6th Cir. 1988)(finding that, in absence of program for testing physical fitness, a mandatory retirement age of 55 was not a BFOQ), *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989); *EEOC v. Commonwealth of Pennsylvania*, 829 F.2d 392 (3rd Cir. 1987)(holding that in absence of mandatory minimum fitness standards for all officers, the state police could not justify its mandatory retirement age of 60 as a BFOQ), *cert. denied*, 485 U.S. 935, 108 S.Ct. 1109, 99 L.Ed.2d 271 (1988). *Cf. EEOC v. New Jersey*, 631 F.Supp. 1506 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3rd Cir. 1987)(upholding mandatory retirement at 55 for state police officers where all members of the force were subject to mandatory fitness requirements).

The BFOQ vista has undergone considerable landscaping since *Mahoney*. I believe the contours of the law were changed by *Criswell* and *Johnson*; the Landy report has overturned comfortable old assumptions about the reliability of age as an indicator of ability; and even the composition of the State Police has undergone a radical transformation. Other circuits

indicator of ability; and even the composition of the State Police has undergone a radical transformation. Other circuits have surrendered their admittedly easily administered mandatory retirement ages in favor of fairer although more cumbersome physical fitness standards. Given this metamorphosis, the case at hand seems an appropriate vehicle in which to revisit this circuit's treatment of the question of age as a proxy for performance. On the record in this case, it seems to me that the First Circuit's previous analysis of these issues deserves reconsideration.

Given that the plaintiffs have thus demonstrated a likelihood of success on the merits, and have prevailed, no matter how narrowly, on the other three factors, their motion for preliminary injunction is granted. An order will issue accordingly.

SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| DANIEL J. GATELY, et al.<br>Plaintiffs, | ) | |
| v. | ) | C.A. No.<br>92-13018-MA |
| COMMONWEALTH OF MASSACHUSETTS, THOMAS RAPONE, SECRETARY OF PUBLIC SAFETY, and FRANCIS McCAULEY, EXECUTIVE DIRECTOR MASSACHUSETTS STATE BOARD OF RETIREMENT,<br>Defendants. | ) | |

*ORDER ON PRELIMINARY INJUNCTION*

Upon motion of the plaintiffs, and on the basis of the Complaint and the Affidavits of Alexander Avola, Jr., Charles Robert Ayer, Gregory D'Aiuto, Robert T. Devereaux, Daniel J. Gately, Anthony F. Lo Conte, John F. Mahoney, John L. O'Brien, Robert J. Vance and the exhibits attached to the Affidavit of James B. Conroy, the Court finds that it is clear that the plaintiffs will be irreparably harmed if the temporary restraining order is not entered, that the balance of harms

favors plaintiffs, that plaintiffs are likely to succeed on the merits, and that the public interest will be served by entry of this Order.

ACCORDINGLY, IT IS HEREBY ORDERED UNTIL FURTHER ORDER OF THE COURT:

(1) that defendants, their agents, servants, employees and all others acting in concert with them, are temporarily restrained and enjoined from dismissing or retiring plaintiffs or other officers because they are aged 55 or older; and

(2) that the running of 1991 Mass. Acts ch. 412, §122, be tolled to permit plaintiffs who will attain the age of 55 on or before December 31, 1992, and all other individuals similarly situated, to retire at the 80% benefit level in the event that judgment enters against them or that an injunction is denied, expires or is dissolved after December 31, 1992.

SO ORDERED.

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United States District Judge

Dated: December 30, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL J. GATELY, et al.
Plaintiffs,

v. C.A. No. 92-13018-MA

COMMONWEALTH OF MASSACHUSETTS, THOMAS RAPONE, SECRETARY OF PUBLIC SAFETY, and FRANCIS McCAULEY, EXECUTIVE DIRECTOR, MASSACHUSETTS STATE BOARD OF RETIREMENT,
Defendants.

*AMENDED ORDER ON PRELIMINARY INJUNCTION*

MAZZONE, D.J.
November 24, 1993

Upon motion of the plaintiff, and on the basis of the Complaint and the Affidavits of Alexander Avola, Jr., Charles Robert Ayer, Gregory D'Aiuto, Robert T. Devereaux, Daniel J. Gately, Anthony F. LoConte, John F. Mahoney, John L. O'Brien, Robert J. Vance, and the exhibits attached to the Affidavit of James B. Conroy, the Court finds that it is clear that the plaintiffs will be irreparably harmed if the temporary

restraining order is not entered, that the balance of harms favors plaintiffs, that plaintiffs are likely to succeed on the merits, and that the public interest will be served by entry of this Order.

ACCORDINGLY, IT IS HEREBY ORDERED UNTIL FURTHER ORDER OF THE COURT:

(1) that the defendants, their agents, servants, employees and all others acting in concert with them, are temporarily restrained and enjoined from dismissing or retiring plaintiffs or other officers because they are age 64 or younger; and

(2) that the running of the 1991 Mass. Acts ch. 412, § 122, be tolled to permit plaintiffs who will attain the age of 55 on or before December 31, 1992, and all other individuals similarly situated, to retire at the 80% benefit level in the event that judgment enters against them or that an injunction is denied, expires or is dissolved after December 31, 1992.

SO ORDERED.

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United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 92-2485

DANIEL J. GATELY, ET AL.,
Plaintiffs, Appellees,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellants.

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Before

Breyer, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
Torruella, Selya, Cyr, Boudin and Stahl,
*Circuit Judges*.

ORDER OF COURT

Entered: October 13, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active

service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Franics P. Scigliano

Clerk.

[cc: Messrs. Conroy and Barnico]

A-51

SUPREME COURT OF THE UNITED STATES

No. A.-529

Commonwealth of Massachusetts,
et al.

v.

Daniel Gately, et al.

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 14, 1994.

*/s/ David H. Souter*
Associate Justice of the Supreme
Court of the United States

Dated this 28th
day of December, 1993.

The Complaint includes the following plaintiffs:

Daniel J. Gately, Alexander Avola, Jr., Charles Robert Ayer, Robert J. Barrows, Lemuel S. Bell, John Bianchi, Donald E. Callender, David E. Chaisson, Bruce W. Courage, Gregory D'Aiuto, Robert T. Devereaux, Daniel D. Dhionis, Robert E. Falcone, Richard E. Flaherty, Charles W. Flynn, Ronald C. Foley, Jerome E. Gately, Walter F. Gibson, James O. Giffen, Jr., John J. Grealish, Michael J. Kelliher, Joseph Henry Knight, Bradford F. Kurcieviez, Anthony F. Lo Conte, John J. MacDonald, John F. Mahoney, James Brian Malloy, John A. Martin, Charles R. McCarthy, Vincent A. Micale, Ahmed A. Mustaf, John L. O'Brien, William F. O'Connell, Albert P. Parker, Robert T. Rafferty, James G. Ricci, Ralph E. Richardson, John Roche, Robert E. Roche, William L. Schulze, Robert F. Tierney, Robert E. Tremblay, William P. Trudell, and Robert W. Worthley

The Second Amended Complaint includes the following plaintiffs:

Daniel J. Gately, Stephen R. Ahlstedt, Victor Albonetty, Alexander Avola, Jr., Charles Robert Ayer, John F. Banik, Robert J. Barrows, Lemuel S. Bell, John E. Bianchi, John M. Brandt, Jr., David L. Buell, Jr., Henry G. Bushfan, Donald E. Callender, Charles A. Capece, Joseph Cantanese, Brian A. Caron, David E. Chaisson, Edward F. Chiasson, Thomas R. Cloonan, James C. Coogan, Bruce W. Courage, Paul C. Crowley, Howard Croxton, Thomas Culliney, Gregory

D'Aiuto, David J. Daley, Jr., William A. Deluca, Robert T. Devereaux, Daniel D. Dhionis, John F. Downey, Richard Edgerly, Robert E. Falcone, Richard E. Flaherty, Charles W. Flynn, Ronald C. Foley, Joseph A. Ford, Mark S. Ford, Jerome F. Gately, Walter F. Gibson, James O. Giffen, Jr., Anthony S. Grassia, Kenneth Glover, Thomas F. Grady, Ronald Gray, John J. Grealish, Thomas F. Grealy, Robert P. Green, Michael Griffin, Rosemarie Hicks, Jeremiah J. Kelleher, Michael J. Kelliher, Gerald J. Kelley, Michael Kelly, Joseph Henry Knight, Bradford F. Kurcieviez, Kevin Layden, Thomas Leavy, Edward J. Lee, Jr., Anthony F. Lo Conte, John J. MacDonald, John F. Mahoney, James Brian Malloy, Paul Maloney, John A. Martin, Charles R. McCarthy, Paul McCarthy, Paul F. McDonald, John N. Melia, Vincent A. Micale, James D. Mills, Robert M. Morgan, Jr., John J. Morris, Ahmed A. Mustaf, John L. O'Brien, Richard B. O'Connell, William F. O'Connell, Charles B. Oliver, Edward J. O'Neill, Joseph F. Pagliuca, Albert P. Parker, Dennis J. Pembroke, Robert J. Preczewski, James J. Powers, Stephen D. Prendergast, Robert T. Rafferty, Jr., James G. Ricci, Ralph E. Richardson, Reid L. Rideout, Robert E. Roche, Thomas F. Ryan, Carmen Santoro, Jr., William L. Schulze, Robert Shorey, John D. Sullivan, Robert E. Sullivan, Robert F. Tierney, Robert E. Tremblay, William P. Trudell, David Walsh, John M. Walsh, and Roger W. Worthley

Mass. St. 1991, c. 412, § 1 provides:

The metropolitan district commission police force, the division of state police, the capitol police force and the division of law enforcement of the registry of motor vehicles shall be consolidated as one police force. Such consolidation shall begin on July first, nineteen hundred and ninety-two and shall be completed by July first, nineteen hundred and ninety-three, with a one-year transition period, so called, so that after such transition period, said four police forces shall be deemed consoldiated and merged, and the consolidated police force shall be called the department of state police. The consolidated department of state police shall be deemed to be the police force of the commonwealth, so that it shall be the force with jurisdictional authority over state property, except as otherwise provided in section one A, and it shall be required to respond to calls for assistance for public safety services by any other police force in the commonwealth or any of its political subdivisions.

Mass. St. 1991, c. 412, § 122 provides:

In accordance with the provisions of section twenty-six of chapter thrity-two of the General Laws, as amended by the provisions of section thirty-three of this act, any person serving in a position or employed as a police officer in the capitoal police force, the metropolitan district police force or the detective force of the division of state police or serving in a position or employed as an employee exercising police powers in the division of law enforcement of the registry of motor vehicles who shall have reached his fifty-fifth birthday on or before December thirty-first, nineteen hundred and ninety-two, shall be precluded from transfering to the department of state

police and shall be eligible to retire under the provisions of this paragraph on or after July first, nineteen hundred and nine-two; provided, however, that such person shall retire under the provision of this paragraph from his position as such police officer or employee exercising police powers on or before said December thirty-first, nineteen hundred and ninety-two; and provided further, that notwithstanding so much of the provisions of said section twenty-six that provides a retirement allowance for a uniformed member of the state police, such person shall receive a retirement allowance equal to eighty percent of the average annual rate of the regular compensation received by such person during any period of three consecutive years of creditable service for which such rate of compensation received by such person during the period or periods, whether or not consecutive, constituting his last three years of of creditable service preceding retirement, whichever is greater.

Mass. St. 1991, c. 412, § 123 provides:

In accordance with the provisions of section twenty-six of chapter thirty-two of the General Laws, as amended by the provisions of section thirty-three of this act, any person serving in a position or employed as a police officer in the capitol police force, the metropolitan district police force, or the uniformed branch of the division of state police or serving in a position or employed as an employee exercising police powers in the division of law enforcement of the registry of motor vehicles who shall have transferred to the department of state police pursuant to the provisions of this act, who shall reach his fifty-fifth birthday on or after December thirty-first, nineteen hundred and ninety-two shall be retired on such-fifty-fifth birthday and, notwithstanding so much of the provisions

of said section twenty-six that provides for a retirement allowance, shall receive a retirement allowance in an amount equal to seventy-five percent of his regular compensation during the twelve month period immediately preceding such fifty-fifth birthday or in an amount equal to the retirement allowance such person would have been eligible to receive under the provisions of Group 4 of paragraph (g) of subdivision (2) of section three of said chapter thirty-two on such fifty-fifth birthday had such person not transferred to said department of state police, whichever is greater.